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Nos. 88-1872, 88-2074

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

CYNTHIA RUTAN, *et al.*,
Petitioners,

v.

REPUBLICAN PARTY OF ILLINOIS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF OF THE NATIONAL EDUCATION ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS CYNTHIA RUTAN, *ET AL.*

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MOTION OF THE NATIONAL EDUCATION ASSOCIATION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS CYNTHIA RUTAN, ET AL.

The National Education Association (NEA) moves for leave to file the attached brief *amicus curiae* in support of petitioners Cynthia Rutan, *et al.* Consent to the filing of said brief has been obtained from all parties except the Republican Party of Illinois, which has refused to consent.

NEA is the largest public employee organization in the United States, with approximately two million members, virtually all of whom are employed by public educational institutions. Because NEA members in certain

jurisdictions are subject to patronage practices such as those at issue here, NEA has a vital interest in the disposition of this case. Moreover, the Court's decision may have an impact on the exercise of First Amendment rights by NEA members in other contexts.

In the attached brief *amicus curiae*, NEA seeks to demonstrate that the court below erred in holding that patronage employment practices that are not the "substantial equivalent to a dismissal" are permitted by the First Amendment. To support this conclusion the brief establishes three propositions: first, that an employment action need not amount to dismissal in order to give rise to a cognizable First Amendment claim; second, that the interest of the State as an employer is no stronger in the case of patronage hiring, rehiring after layoff, promotion, or transfer than in the case of patronage dismissal, and cannot justify the challenged employment actions; third, that the interest of the State in the preservation of the democratic process is not served by patronage employment practices, and even if it were, the use of such practices with regard to persons already employed by the government goes far beyond what possibly could be necessary to serve that asserted State interest.

For the foregoing reasons, this motion for leave to file the attached brief *amicus curiae* should be granted.

Respectfully submitted,

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BRIEF OF THE NATIONAL EDUCATION ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS CYNTHIA RUTAN, ET AL.

The National Education Association submits this brief *amicus curiae* contingent upon the granting of the foregoing motion for leave to file said brief. The interest of the *amicus curiae* is stated in that motion.

SUMMARY OF ARGUMENT

Petitioners Cynthia Rutan, *et al.* ("plaintiffs") alleged that they were deprived of certain employment benefits because of "political considerations," including whether they were members of the Republican Party, were sponsored by influential Republicans, and were contributors to the Republican Party. The court below acknowledged that if this case had involved *dismissals* from employment, plaintiffs' allegations would, under this Court's decisions in *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980), state a claim for relief. The Court of Appeals ruled, however, that the

principles established in *Elrod* and *Branti* should be confined to patronage dismissals and to other patronage employment practices that are the "substantial equivalent to a dismissal." 868 F.2d at 949-54. That ruling is erroneous.

The line drawn by the Court of Appeals cannot be defended, as defendants urged below, on the ground that employment sanctions directed at protected association or beliefs do not rise to a level of constitutional magnitude unless dismissal or its "substantial equivalent" is involved. This Court has made it abundantly clear that First Amendment rights are implicated whenever the State denies an employment benefit to a person because of his or her constitutionally protected association or beliefs. Part I, *infra* at pp. 7-14.

Accordingly, the only basis on which the ruling of the court below could be defended would be that there is a specific governmental interest sufficient to justify the limitations that the challenged patronage practices place on the First Amendment rights at stake. For purposes of analysis, the governmental interests arguably involved in this case must be divided into two distinct categories: (A) the State's interest as an employer in providing for "the effective performance of the public office involved," *Branti*, 445 U.S. at 518, and (B) the State's interest in "the preservation of the democratic process," *Elrod*, 427 U.S. at 368 (plurality opinion).

With respect to the interest of the State as an employer, *Branti* held that "the question is whether the [State] can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved," 445 U.S. at 518. That formulation is fully consistent with the Court's more developed analysis in *Connick v. Myers*, 461 U.S. 138 (1983), and *Rankin v. McPherson*, 483 U.S. 378 (1987). The latter cases establish that where an employment action is based on an employee's speech, association or beliefs respecting a matter of "public concern," it is entirely appropriate for a

federal court to scrutinize that action by balancing "the government's interest in the effective and efficient fulfillment of its responsibilities to the public," *Connick*, 461 U.S. at 150, against "[the employee's] interest in making her statement [or in holding to her association or beliefs]," *Rankin*, 483 U.S. at 388. In striking that balance, the relative severity of the employment sanction that has been imposed—be it suspension, termination, denial of promotion, or some other action—is not a factor to be weighed: the interest to be evaluated is the employee's interest in freedom of speech, association and belief, not his or her interest in employment as such. It follows that unless the State can demonstrate that "party affiliation is an appropriate requirement for the effective performance of the public office involved," the interest of the State as an employer would not justify patronage hiring, rehiring after layoff, promotion or transfer any more than that interest would justify patronage dismissal. Part II A, *infra* at pp. 15-21.

It also has been argued—particularly by Justice Powell in dissent in both *Elrod* and *Branti*—that because patronage allegedly contributes to the development of stable political parties, it is essential to the State's interest in the preservation of the democratic process. In *Elrod* and *Branti* the Court found this rationale insufficient to justify patronage dismissals. As the plurality opinion in *Elrod* persuasively demonstrates, patronage is, at bottom, a practice that profoundly disserves the democratic system; therefore it is insufficient as a justification for *any* employment actions. But even if it were accepted that *some* degree of patronage is essential to the preservation of the democratic process, the fact that patronage restricts freedom of belief and association dictates that this governmental interest be pursued through the means least restrictive of those freedoms. *Elrod*, 427 U.S. at 362-63 (plurality opinion). *See also, e.g., Boos v. Barry*, 485 U.S. 312, 108 S. Ct. 1157, 1168 (1988). If the State's interest in fostering the democratic process requires the toleration of

any patronage practices—and we contend that it does not —that interest surely does not require the use of patronage with regard to employees *after they have been hired.* Moreover, the use of patronage to govern decisions affecting persons already in the government's employ is even more "intrusive" of employee interests than is patronage hiring, *cf. Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 283 (1985) (plurality opinion), and such use also puts improper pressure on public employees to "practic[e] political justice" in performing their duties, *CSC v. Letter Carriers*, 413 U.S. 548, 565 (1973). It follows that if the State's interest in the preservation of the democratic process justifies any use of patronage, such use should be limited strictly to hiring, and should not extend to rehiring after layoff, promotion, transfer, dismissal, or other post-hiring employment decisions. Part II B, *infra* at pp. 21-29.

ARGUMENT

INTRDUCTION

Because this case was decided on a motion to dismiss for failure to state a claim, it must be taken as true that the employment actions at issue were "substantially motivated by political considerations," including, *inter alia*, whether plaintiffs were members of the Republican Party, were sponsored by influential Republicans, and were contributors to the Republican Party, Complaint ¶ 11f. It also must be taken as true that the denials of employment benefits to plaintiffs were "a direct and proximate result" of the aforesaid patronage practices. *Id.* ¶¶ 31-34. *See also id.* ¶ 11k ("The purpose and effect of the political patronage system operated under the 'Governor's Office of Personnel' is to limit State employment and the benefits of State employment to those who are politically favored and to limit and prevent those who are not favored from having such employment benefits.").

If this case had involved *dismissals* from employment, the allegations would, under this Court's decisions in

Elrod v. Burns, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980), state a claim for relief, unless it were shown that the jobs in question were ones as to which "party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti*, 445 U.S. at 518.[1] Neither defendants nor the court below assert that *Elrod* or *Branti* were wrongly decided, and they do not suggest that the jobs involved here—which include equipment operator, garage employee, and "Dietary Manager" at a particular facility —are such as to invoke the exception for the "effective performance of the public office involved."[2] Rather, defendants and the court below maintain that the principles established in *Elrod* and *Branti* are not controlling in

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[1] Defendants have argued that plaintiffs failed to state a claim because they did not allege that defendants relied *solely* on political considerations in making the challenged employment decisions. *See also Avery v. Jennings*, 786 F.2d 233, 236 (6th Cir. 1986), *cert. denied*, 477 U.S. 905 (1986). Such an allegation is not required. It is hardly conceivable that any employment decision would be based *solely* on a constitutionally prohibited criterion; the decisionmaker will almost always consider, at least to some minimal extent, other factors, such as whether a candidate possesses the stated qualifications for a position. Constitutional protections would virtually evaporate if, as defendants suggest, they were available only where the government acts with utter single-mindedness. The cases adopt no such approach. Rather, if a plaintiff alleges and ultimately proves that protected speech, association or belief was a " 'substantial factor'—or, to put it in other words, that it was a 'motivating factor' "—in an employment action, the burden shifts to the defendant to "show[] by a preponderance of the evidence that it would have reached the same decision . . . even in the absence of the protected conduct." *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977). Thus plaintiffs' allegations of causation are sufficient to state a claim of a constitutional deprivation. *See Branti*, 445 U.S. at 512 n.6. The Sixth Circuit's contrary suggestion in *Avery, supra*, is flatly inconsistent with both *Branti and Mt. Healthy.*

[2] We do not understand defendants to take the position that these jobs fall into that category. In all events, at this juncture (motion to dismiss for failure to state a claim) such a proposition certainly has not been established.

this case because the burden imposed by the challenged patronage practices "is much less significant than losing a job," 868 F.2d at 952. They contend that these principles should be confined to dismissals and to employment actions that are the "substantial equivalent to a dismissal." 868 F.2d at 949-54.[3]

The Court of Appeals offered no reasoned support for the construct it adopted,[4] but it is axiomatic that if the

[3] The Court of Appeals' concept of the "substantial equivalent to a dismissal" makes no sense on its own terms, as Judge Cudahy noted in dissent. *See* 868 F.2d at 959 (Cudahy, J., dissenting). The Court of Appeals stated that in determining whether an employment action is the "substantial equivalent to a dismissal," the courts should apply the familiar definition of a "constructive discharge"—*viz.*, employer conduct that would cause a reasonable person to quit his employment. *See* 868 F.2d at 950. Yet the court also stated that such claims can be brought by persons who did *not* quit. *See id.* at 955-56. This approach is totally illogical: to ask whether a person who is still employed was constructively discharged is a contradiction in terms; and if the test is whether a reasonable person would have quit, then by definition, if the employee did *not* quit, only an "unreasonable" plaintiff can prevail.

[4] The Court of Appeals declared that its decision to limit *Elrod* and *Branti* to discharges (actual or constructive) flowed from two considerations: (i) "the fact that real differences exist between dismissals and other patronage practices" because "absent unusual circumstances, employment decisions not involving dismissals, such as failing to transfer or promote an employee, are significantly less coercive and disruptive than discharges," *id.* at 952, and (ii) "the substantial intrusion of the federal courts into the political affairs of the States and other branches of the federal government that would necessarily flow from extending *Branti* and *Elrod* beyond constructive discharges," *id.* As we show in the body of our argument, these considerations fail to support the court's position.

The court below added a third factor to the mix by declaring that actions "falling short of actual or constructive discharge" are actionable if they constitute *"retaliatory harassment,"* but that "acts of retaliation must be distinguished from favored treatment of political supporters that has the incidental effect of making a nonsupporter no better off," *id.* at 954 n.4 (emphasis added). This proffered distinction between favoring supporters and retaliating against opponents leads to nonsensical results: an employee denied a promotion because he was not a Republican would have no claim, but "even an act of retaliation as trivial as failing to hold a birthday party for a public employee could be actionable" if it were based on political affiliation, *id. See also Pieczynski v. Duffy*, 875 F.2d 1331, 1333, 1336 (7th Cir. 1989) (public employee may be denied hire, promotion or transfer due to his political beliefs or affiliations, but "a campaign of petty harassments directed against a public employee in retaliation for his political beliefs or affiliations violates the First Amendment"). And, the Seventh Circuit's construct does violence to the most basic principles of First Amendment law. No one would suggest, for example, that although a public employer could not refuse to promote Jewish employees because the employer disliked Jews, it would be constitutional for the employer to adopt a policy favoring Christian candidates because the employer liked Christians. So too in the context of patronage practices, the distinction proposed by the Court of Appeals, to the extent that it has any operational content, "would surely emasculate the principles set forth in *Elrod*. While it would perhaps eliminate the mo[st] blatant forms of coercion . . ., it would not eliminate the coercion of belief that necessarily flows from the knowledge that one must have a sponsor in the dominant party . . . ." *Branti*, 445 U.S. at 516.

line drawn by that court is to be defended, the defense must either be that patronage practices short of dismissal implicate no First Amendment rights, or that some specific governmental interest justifies the encroachment on First Amendment rights that does result from the patronage practices at issue. We consider—and refute—each of these possible defenses in turn below.

I. EMPLOYMENT ACTIONS BASED ON PATRONAGE NEED NOT AMOUNT TO DISMISSAL IN ORDER TO GIVE RISE TO A COGNIZABLE FIRST AMENDMENT CLAIM

The line drawn by the Court of Appeals plainly cannot be defended, as defendants urged below, on the ground that employment sanctions directed at protected speech, association or belief do not rise to a level of constitutional magnitude unless dismissal or its "substantial equivalent" is involved. This Court has made it abundantly clear that " '[f]reedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interfer-

ence.'" *Healy v. James*, 408 U.S. 169, 183 (1972) (quoting *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960)). *See also Sweezy v. New Hampshire*, 354 U.S. 234, 264 (1957) (Frankfurter, J., concurring) ("'It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure.'" (quoting *Boyd v. United States*, 116 U.S. 616, 635 (1886)).

Thus, the Court consistently has rejected the suggestion that only the most onerous sanctions or burdens imposed on speech and association trigger First Amendment scrutiny. For example, in *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981), which involved a limit on contributions to committees formed to support or oppose ballot measures, the Court stated that "[t]o place a Spartan limit—*or indeed any limit*—on individuals wishing to band together to advance their views on a ballot measure . . . is clearly a restraint on the right of association." *Id.* at 296 (emphasis added). And, in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), the Court had this to say with respect to agency fees that public employees were required to pay to a union:

> The amount at stake for each individual dissenter does not diminish [the risk that the dissenter's funds will be used to finance ideological activities unrelated to collective bargaining]. For, *whatever the amount*, the quality of respondents' interest in not being compelled to subsidize the propagation of political or ideological views that they oppose is clear. In *Abood* [*v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977)], we emphasized this point by quoting the comments of Thomas Jefferson and James Madison about the tyrannical character of forcing an individual to contribute even "three pence" for "the propagation of opinions which he disbelieves."

Id. at 305 (emphasis added; footnote omitted). *See also Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 46 (1868) (tax of one dollar for passing through state of Nevada just as unconstitutional as tax of $1,000).[5]

[5] Applying this properly unyielding principle, the Court has recognized constitutional violations in numerous government actions involving relatively small burdens on First Amendment rights. In the freedom of association area alone, the Court has found that, *inter alia*, the following penalties rise to a level that triggers constitutional solicitude: denying college recognition to a campus organization, *Healy v. James*, *supra*; forbidding all individual campaign expenditures over $1000 per candidate, *Buckely v. Valeo*, 424 U.S. 1, 22-23, 39-51 (1976) (per curiam); forbidding contributions over $250 to committees supporting or opposing ballot proposals, *Citizens Against Rent Control v. City of Berkeley*, *supra*; requiring party disclosure of all campaign contributors, *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 (1982); withholding mailings, *Lamont v. Postmaster General*, 381 U.S. 301 (1965); revoking passports, *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); and compelling disclosure of party membership lists, *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). And, in other cases involving freedom of speech and belief, state sanctions that have been found to violate First Amendment rights have included the following: taxing certain types of publications, *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987); suspending a student from school, *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969); withholding public television grants, *FCC v. League of Women Voters of California*, 468 U.S. 364 (1984); denying a property tax exemption, *Speiser v. Randall*, 357 U.S. 513 (1958); denying a tax exemption for any paper and ink used by a newspaper beyond a specified amount, *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 591-92 (1983); excluding persons from taking a bar examination, *Schware v. Board of Bar Examiners of New Mexico*, 353 U.S. 232 (1957); and denying unemployment benefits to persons who have exercised religious beliefs, *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136 (1987); *Thomas v. Review Bd. of the Indiana Empolyment Sec. Div.*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963).

It also should be noted that the Court has held that damages under 42 U.S.C. § 1983 for violation of First Amendment rights may include compensation for injuries such as impairment of reputation, personal humiliation, mental anguish and suffering, and mental and emotional distress. *See Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 307 (1986); *see also Carey v. Piphus*, 435 U.S. 247, 263-64 (1978).

In public employment, as in other contexts, the Court's decisions establish that the First Amendment's field of protection does not lie fallow until the government imposes the most severe sanction available to it (*i.e.*, dismissal). Rather, the guiding principle is that the government cannot "deny a benefit to a person because of his constitutionally protected speech or associations," *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). And because this principle is to be "applied . . . regardless of the public employee's contractual or other claim to a job," *id.*, the Court repeatedly has ruled that the State may not impose unconstitutional conditions on employment, even in cases where the employee had no settled expectations of continued service in the job in question. *See, e.g., Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Perry, supra*; and *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), all involving the nonrenewal of *non*tenured teachers' one-year contracts. *See also Torcaso v. Watkins*, 367 U.S. 488 (1961) (First Amendment violation found where a person had been appointed to the office of Notary Public but had not yet received his commission to serve because of his refusal to declare his belief in God).[6]

[6] In the numerous cases involving actual or threatened dismissals that have been decided by this Court, it never has been suggested that constitutional protection would not have been triggered by a refusal to hire, or by some other lesser sanction. *See, e.g., United States v. Robel*, 389 U.S. 258, 266 (1967) (statute sought "to bar employment . . . for association which may not be proscribed consistently with First Amendment rights"); *Keyishian, supra*, 385 U.S. at 605-06 ("the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected"); *Shelton, supra* (unconstitutional statute applied to teachers rehired on a year-to-year basis); *Weiman v. Updegraff*, 344 U.S. 183, 192 (1952) ("constitutional protection does extend to the public servant whose *exclusion* pursuant to a statute is patently arbitrary or discriminatory") (emphasis added). There is nothing in any of these cases to indicate that constitutional protection was available only because employees had developed some settled expectations of continued employment.

In keeping with these principles, the courts of appeals uniformly have recognized that First Amendment claims may arise from employment actions short of dismissal, including such actions as denial of promotion;[7] transfer of jobs (even without loss of pay);[8] reassignment, decrease in responsibility or change of duties;[9] demotion, salary decrease and/or loss of benefits;[10] removal from extra-

[7] *Clark v. Library of Congress*, 750 F.2d 89, 99-102 (D.C. Cir. 1984); *Robb v. City of Philadelphia*, 733 F.2d 286 (3d Cir. 1984); *MacFarlane v. Grasso*, 696 F.2d 217 (2d Cir. 1982); *Bowen v. Watkins*, 669 F.2d 979 (5th Cir. 1982); *Bickel v. Burkhart*, 632 F.2d 1251 (5th Cir. Unit A 1980); *Orr v. Thorpe*, 427 F.2d 1129 (5th Cir. 1970).

[8] *Allen v. Scribner*, 812 F.2d 426 (9th Cir. 1987); *Knapp v. Whitaker*, 757 F.2d 827 (7th Cir. 1985), *cert. denied*, 474 U.S. 803 (1985); *Robb v. City of Philadelphia, supra*; *Bowman v. Pulaski Cnty. Special School Dist.*, 723 F.2d 640 (8th Cir. 1983); *Hughes v. Whitmer*, 714 F.2d 1407, 1421 (8th Cir. 1983) (relief denied for failure to prove that transfer was triggered by First Amendment activity), *cert. denied*, 465 U.S. 1023 (1984); *Egger v. Phillips*, 669 F.2d 497 (7th Cir. 1982), *cert. denied*, 464 U.S. 918 (1983); *Smith v. West Memphis School Dist.*, 635 F.2d 708, 710 (8th Cir. 1980) (relief denied for failure to prove that transfer was triggered by First Amendment activity); *McGill v. Board of Educ. of Pekin Elementary School Dist. No. 108 of Tazewell Cnty.*, 602 F.2d 774 (7th Cir. 1979); *Simpson v. Weeks*, 570 F.2d 240 (8th Cir. 1978); *cert. denied*, 464 U.S. 918 (1983); *Alicea Rosado v. Garcia Santiago*, 562 F.2d 114 (1st Cir. 1977); *Bernasconi v. Tempe Elementary School Dist. No. 3*, 548 F.2d 857 (9th Cir. 1977), *cert. denied*, 434 U.S. 825 (1977); *Acanfora v. Board of Educ. of Montgomery Cnty.*, 491 F.2d 498, 500-01 (4th Cir. 1974) (plaintiff estopped from seeking relief because of omission of information in employment application), *cert. denied*, 419 U.S. 836 (1974).

[9] *Thomas v. Carpenter*, 881 F.2d 828 (9th Cir. 1989); *Reeves v. Claiborne Cnty. Bd. of Educ.*, 828 F.2d 1096 (5th Cir. 1987); *Allen v. Scribner, supra*; *Bowman v. Pulaski Cnty. Special School Dist., supra*; *Reichert v. Draud*, 701 F.2d 1168 (6th Cir. 1983) (relief denied where protected conduct did not play substantial part in decision to change teaching schedule); *Childers v. Indep. School Dist. No. 1 of Bryan Cnty.*, 676 F.2d 1338 (10th Cir. 1982); *Lemons v. Morgan*, 629 F.2d 1389 (8th Cir. 1980); *Acanfora v. Bd. of Educ. of Montgomery Cnty., supra*.

[10] *Waters v. Chaffin*, 684 F.2d 833 (11th Cir. 1982); *Childers v. Indep. School Dist. No. 1 of Bryan Cnty., supra*.

curricular positions at schools;[11] denial of a salary increase;[12] suspension;[13] refusal to recommend for a promotion;[14] filing letters of reprimand or negative or lowered evaluations;[15] providing negative evaluations to prospective employers;[16] denial of a personal leave day;[17] rescission of permission for leave to attend union meetings;[18] removing certain perquisites of office;[19] and harassment.[20] In many of these cases, the courts explicitly have rejected the argument that because the sanction imposed was less injurious than dismissal there could be no cause of action, or have expressly stated that such lesser sanctions must be treated no differently than dismissals.[21]

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[11] *Knapp v. Whitaker, supra* (removal from position as assistant baseball coach); *Lemons v. Morgan, supra* (removal from position as school radio station manager).

[12] *Allaire v. Rogers*, 658 F.2d 1055 (5th Cir. Unit A 1981), *cert. denied*, 456 U.S. 928 (1982).

[13] *Anderson v. Central Point School Dist. No. 6*, 746 F.2d 505 (9th Cir. 1984); *Czurlanis v. Albanese*, 721 F.2d 98 (3d Cir. 1983).

[14] *Hatcher v. Board of Pub. Educ. and Orphanage for Bibb Cnty.*, 809 F.2d 1546, 1555-59 (11th Cir. 1987).

[15] *Knapp v. Whitaker, supra*; *Swilley v. Alexander*, 629 F.2d 1018 (5th Cir. 1980); *Columbus Educ. Ass'n v. Columbus City School Dist.*, 623 F.2d 1155 (6th Cir. 1980); *Yoggerst v. Stewart*, 623 F.2d 35 (7th Cir. 1980); *Simpson v. Weeks, supra*; *Bence v. Breier*, 501 F.2d 1185 (7th Cir. 1974), *cert. denied*, 419 U.S. 1121 (1975); *Muller v. Conlisk*, 429 F.2d 901 (7th Cir. 1970).

[16] *Marohnic v. Walker*, 800 F.2d 613 (6th Cir. 1986) (*per curiam*).

[17] *Knapp v. Whitaker, supra.*

[18] *Orr v. Thorpe, supra.*

[19] *Reeves v. Claiborne Cnty. Bd. of Educ., supra.*

[20] *Pieczynski v. Duffy*, 875 F.2d 1331 (7th Cir. 1989); *Allen v. Scribner, supra*; *Bart v. Telford*, 677 F.2d 622 (7th Cir. 1982).

[21] *See, e.g., Thomas*, 881 F.2d at 829-30; *Allen*, 812 F.2d at 434 nn. 16 & 17; *Anderson*, 746 F.2d at 507-08; *Bowman*, 723 F.2d at 645; *Hughes*, 714 F.2d at 1421; *Reichert*, 701 F.2d at 1172-74 (Krupansky, J., concurring); *Waters*, 684 F.2d at 837 n.9; *Childers*, 676 F.2d at 1341-42; *Egger*, 669 F.2d at 501-02; *Allaire*, 658 F.2d at 1058 n.2; *Bickel*, 632 F.2d at 1255 n.6; *Yoggerst*, 623 F.2d at 39; *McGill*, 602 F.2d at 779-80; *Bernasconi*, 548 F.2d at 860. *See also Robb*, 733 F.2d at 295 (whereas denial of promotion does not cause property loss for purposes of due process analysis, it could constitute First Amendment deprivation).

Although the holding in *Elrod* dealt only with the constitutional validity of patronage dismissals, the plurality decision recognized that First Amendment interests are implicated by *any* governmental action that restricts an individual's employment opportunities on the basis of his or her beliefs or associations. As the plurality put it, "[r]*egardless of the nature of the inducement*, whether it be by the denial of public employment or . . . by the influence of a teacher over students, '[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.'" *Elrod*, 427 U.S. at 356 (plurality opinion) (emphasis added) (quoting *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)). *See also Branti*, 445 U.S. at 513-14. With specific reference to employment, the *Elrod* plurality went on to note that "[t]his Court's decisions have prohibited conditions on public benefits, in the form of jobs or otherwise, which dampen the exercise generally of First Amendment rights, however slight the inducement to the individual to forsake those rights." *Elrod*, 427 U.S. at 358 n.11 (plurality opinion). *See also id.* at 359-60 n.13 ("[T]he inducement afforded by placing conditions on a benefit need not be particularly great in order to find that rights have been violated. Rights are infringed both where the government fines a person a penny for being a Republican and where it withholds the grant of a penny for the same reason.").[22]

The upshot of these principles is that "official pressure upon employees to work for political candidates not of the

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[22] Denial of a benefit based on discriminatory treatment of protected speech, association or belief, such as preferring association with one political party rather than association with another, abridges not only First Amendment rights, but Equal Protection guarantees as well. *See, e.g., Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 227-28 n.3 (1987).

worker's own choice constitutes a coercion of belief in violation of fundamental constitutional rights." *Connick v. Myers*, 461 U.S. 138, 149 (1983). Because this statement holds true whether the instrument of such pressure is a dismissal or some lesser employment sanction,[23] the Court of Appeals' decision cannot be defended on the ground that the employment actions at issue here offend no First Amendment rights. If the rule announced by the court below is to be defended, it must be because some specific governmental interest is sufficient to justify the limitation that the challenged patronage practices impose on the First Amendment rights at stake. As we demonstrate below, that defense also fails.

II. THE INFRINGEMENT OF FIRST AMENDMENT RIGHTS AT ISSUE HERE IS NOT JUSTIFIED BY ANY SUFFICIENT GOVERNMENTAL INTEREST

Two governmental interests are offered in support of patronage employment practices. First, patronage is said to serve the State's interest as an employer in the "effective performance of the public office involved." *Branti*, 445 U.S. at 518. *See generally Elrod*, 427 U.S. at 364-

[23] There could in theory be some employment actions taken against employees that would have no potential to induce *any* forsaking of the exercise of First Amendment rights. For example, the fact that a Republican employer might occasionally frown at a Democratic employee presumably would not be enough of a "sanction" to deter even the most minuscule amount of First Amendment activity. *See Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982). A constitutional tort, like any other tort, requires *some* injury in order to be actionable.

But the Court need not for present purposes consider whether there could be any "*de minimus*" threshold beneath which no constitutional tort would be actionable, because this clearly is not such a case. The Seventh Circuit acknowledged that the employment actions at issue here "will unquestionably have some negative effects on those people who did not support or are not connected with the party or faction in power." 868 F.2d at 952. In fact, the *de minimus* hypothetical may be dismissed as a strawman: cases for injuries of the non-deterring sort described above simply are not brought by plaintiffs in the federal courts, and could readily be disposed of if they were. *See infra* note 28.

68.[24] Second, it is suggested that patronage serves the State's interest in "the preservation of the democratic process," *Elrod*, 427 U.S. at 368; this was the theory of Justice Powell's dissents in *Elrod*, *id.* at 382-87, and *Branti*, 445 U.S. at 527-32. As the following discussion makes clear, these two asserted governmental interests are analytically distinct; it therefore is necessary to consider them separately.

A. Where Political Affiliation is Not "An Appropriate Requirement For the Effective Performance of the Public Office Involved," the Interest of the State as an Employer is No More Served by the Patronage Practices at Issue Here than by the Patronage Dismissals Proscribed in *Elrod* and *Branti*

This Court held in *Branti* that the constitutionality of patronage dismissals turns on whether the State "can

[24] The plurality opinion in *Elrod* identified as separate governmental interests "the need to insure effective government and the efficiency of public employees," 427 U.S. at 364, and "the need for political loyalty of employees, not to the end that effectiveness and efficiency be insured, but to the end that representative government not be undercut by tactics obstructing the implementation of policies of the new administration, policies presumably sanctioned by the electorate." *Id.* at 367. These two interests, which implicate the State's interests as an employer in providing services to the public, essentially were consolidated into one interest in *Branti*, when the Court stated that "the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." 445 U.S. at 518. *See also id.* at 517 & n.12. The *Branti* Court's recognition that these two interests are facets of what is in reality a single State interest is sound. Just as the effective performance of a job in the private sector requires not only efficiency but also fidelity to the directives of the company's managers, the effective performance of a public sector job requires fidelity to the policy directives of higher officials. The fact that those officials presumably speak for the electorate rather than for private shareholders may give the matter an added dimension, but it does not change the nature of the inquiry: either an employee's party affiliation is "an appropriate requirement for the effective performance of the public office involved"—whether in contributing to efficiency or in contributing to fidelity to policy—or it is not.

demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved," 445 U.S. at 518. Because the only practice at issue in *Branti*, as in *Elrod*, was patronage dismissal, the Court had no occasion to address the constitutionality of other kinds of patronage practices. But nothing in the Court's analysis suggests that the State's interest as an employer could justify using patronage to determine who will hold a position through hiring, rehiring after layoff, promotion, or transfer, when that interest would not justify using patronage as a basis for discharging a person from that same position. To the contrary, the *Branti* Court stated that where, as with the assistant public defender positions at issue in that case, the State cannot demonstrate "that party affiliation is an appropriate requirement for the effective performance of the public office involved," "it is difficult to formulate any justification for tying *either the selection or retention* of [the employee] to his party affiliation," *id.* at 520 n.14 (emphasis added). As Justice Powell observed in his dissenting opinion, "[i]f this latter statement is not a holding of the Court, it at least suggests that the Court perceives no constitutional distinction between selection and dismissal of public employees," *id.* at 522.

The teaching that we derive from *Elrod* and *Branti* (*i.e.*, that if the State's interest as an employer does not justify patronage dismissals with respect to a particular job because party affiliation is not "an appropriate requirement for the effective performance of the public office involved," that interest likewise does not justify using patronage as the basis for other employment actions with respect to that job), is confirmed by subsequent cases involving other First Amendment claims arising in the context of public employment. The basic mode of analysis that applies in balancing the interest of the State as an employer against the interest of employees in freedom of speech, belief, and association, was fully developed by the Court in the post-*Branti* cases of *Connick v. Myers*, 461 U.S. 138 (1983), and *Rankin v. McPherson*,

483 U.S. 378 (1987). Those decisions establish two principles that are crucial to the proper resolution of this case.

First, because the Court in *Connick* recognized the importance of avoiding unduly intrusive involvement by the judiciary in the employment actions of government officials, it specifically indicated when judicial scrutiny is, and is not, appropriate:

> *When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community*, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.

461 U.S. at 146 (emphasis added).[25] *Connick* thus makes clear that where, as here, an employment action is based on an employee's beliefs or association relating to matters of "political . . . concern," judicial scrutiny is appropriate.[26]

The Court of Appeals' expressed desire to minimize judicial oversight of public employment, *see* 868 F.2d at 954, therefore cannot justify closing the courthouse doors to employees who claim that they have been penalized for their beliefs and association with respect to matters of political concern. And, that court's apprehension that every employment decision made by a member of the in-party might be challenged as politically discriminatory by a member of the out-party, *id.*, is no different in nature

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[25] *See also Bishop v. Wood*, 426 U.S. 341, 349-50 (1976) (judicial review of "the multitude of personnel decisions that are made daily by public agencies" is not appropriate "[*i*]*n the absence of any claim* that the public employer was motivated by a desire to curtail or to penalize the exercise of an employee's constitutionally protected rights") (emphasis added).

[26] Although the quoted passage from *Connick* refers to employee "expression," the Court has always recognized that if employees are protected in their speech, they are equally protected in their beliefs and association. *See, e.g., Branti*, 445 U.S. at 515.

than the apprehension voiced by some employers that every employment decision made by a male might be challenged as sexually discriminatory by a female, or that every employment decision made by a white might be challenged as racially discriminatory by a Black. The judicial system is capable of determining whether a challenged employment action is in fact attributable to the improper motive alleged by the plaintiff;[27] and the reality that the determination may sometimes be difficult to make does not justify closing the courts to claims of political discrimination any more than it would justify doing so with respect to claims of discrimination based on race, sex, speech or other impermissible factors. *See Davis v. Bandemer*, 478 U.S. 109, 125 (1986) ("that the claim is submitted by a political group, rather than a racial group, does not distinguish it in terms of justiciability").[28]

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[27] *See generally Price Waterhouse v. Hopkins*, —— U.S. ——, 109 S. Ct. 1775 (1989); *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252 (1977).

[28] It is, after all, "the uniqueness of our Constitution and our system of judicial review [that] courts at all levels are available and receptive to claims of injustice, large and small, by any and every citizen of this country." *Rankin*, 483 U.S. at 392 (Powell, J., concurring).

Moreover, in this context as in others, the courts have ample mechanisms for terminating litigation in appropriate circumstances. Summary judgment is available where warranted, *see, e.g., Anderson v. Liberty Lobby*, 477 U.S. 242 (1986); *Celotex v. Catrett*, 477 U.S. 317 (1986). Also, even where a claim is *meritorious*, a public official sued in his individual capacity is entitled to qualified immunity if the right the official is alleged to have violated was not "clearly established," *see Anderson v. Creighton*, 483 U.S. 635 (1987); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and a denial of qualified immunity is immediately appealable to the extent that it turns on a question of law, *see Mitchell v. Forsyth*, 472 U.S. 511, 524-30 (1985). What is more, claims against a governmental entity under 42 U.S.C. § 1983 may be maintained only if the action complained of is attributable to the "final policymaking authority" of the entity, *see Jett v. Dallas Indep. School Dist.*, —— U.S. ——, 109 S. Ct. 2702, 2723-24 (1989); *St. Louis v. Praprotnik*, 485 U.S. 112 (1988). Given these and other mechanisms, the Court of Appeals' fear that claims of political discrimination will overtax the courts is greatly exaggerated. And, in all events, the court's apprehension provides no principled basis for refusing to entertain these claims. *Connick, supra*; *Davis v. Bandemer, supra*, 478 U.S. at 126.

Second, Connick and *Rankin* indicate how the courts are to arrive "'at a balance between the interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" *Connick*, 461 U.S. at 140 (quoting *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968)). *See also Rankin*, 483 U.S. at 384. The role of the courts is to give "full consideration [to] the government's interest in the effective and efficient fulfillment of its responsibilities to the public," *Connick*, 461 U.S. at 150, and then, to the extent that the government's interest is affected by the employee's speech, belief or association, to balance that interest against "[the employee's] interest in making her statement [or in holding to her association or beliefs]," *Rankin*, 483 U.S. at 388. In striking that balance, "the nature of the employee's expression" is to be considered, *Connick*, 461 U.S. at 150 & n.9, because it bears on "[the employee's] interest in making her statement," *Rankin*, 483 U.S. at 388.[29] But the severity of the employment sanction that has been imposed—be it suspension, termination, denial of promotion, or some other action—is not a factor to be weighed in the balance: the interest to be considered is the employee's interest in freedom of speech, association, and belief, not his or her interest in employment as such.

Thus, if the balance results in a determination that the interest of the State, as an employer, does not outweigh the interest of the employee in making a particular statement, holding a particular belief, or exercising freedom of association, it follows that the State, as employer, may

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[29] *See also Connick*, 461 U.S. at 152 ("We caution that a stronger showing [of harm to the government's interests] may be necessary if the employee's speech more substantially involved matters of public concern.").

not impose *any* employment sanction on the employee for that statement, belief, or association. As Justice Scalia has aptly put it, the question is "whether, given the interests of this [government] office, [the employee] had a *right* to say what she did—so that she could not only not be fired for it, but could not be formally reprimanded for it, or even prevented from repeating it endlessly into the future." *Rankin*, 483 U.S. at 399 (dissenting opinion) (emphasis in original).[30]

Branti defines the proper basis for applying these principles in a patronage case. Because "the state interest element of the [*Pickering/Connick*] test focuses on the effective functioning of the public employer's enterprise," *Rankin*, 483 U.S. at 388,[31] the *Branti* formulation, which asks whether the State has demonstrated "that party affiliation is an appropriate requirement for the effective performance of the public office involved," is entirely consistent with this Court's established jurisprudence in the area of public employment. If the State can make the necessary demonstration, party affiliation may be taken into account in determining who holds a particular office. If the State *cannot* demonstrate that party affiliation is an appropriate requirement for a position, then, insofar as the State's interest as an employer is concerned,

[30] If the law were otherwise, the courts would be called upon in every public employment case to decide whether the particular employment action taken by the government in response to an employee's protected conduct was the most appropriate response, or whether some other action—for example, suspension rather than dismissal—would have been more appropriate. That is not the role of the courts. To be sure, if the balance in a particular case favors the State, and the government therefore has a right to take steps to protect its legitimate interests at the expense of the employee's right of speech or association, it is incumbent upon the government to use the least restrictive means of protecting its interest as an employer, *see infra* at pp. 26-27, and this will in some cases require scrutiny of the *nature* of the action the government has taken. But that is a far cry from weighing the *severity* of the employment action, as such, in the *Pickering/Connick* balance.

[31] *See also id.* at 393 n.* (Powell, J., concurring).

party affiliation is no more relevant in determining whether one employee should be hired, rehired after layoff, promoted, or transferred into the position than in determining whether another employee should be removed from the position.

Inasmuch as the necessary demonstration has not been made for the positions involved in this case—which include equipment operator, garage employee, and Dietary Manager, *see supra* at p. 5 & note 2,[32]—it follows that the First Amendment infringement worked by the patronage practices at issue cannot be justified by any interest of the State as an employer.

B. The State's Interest in the Preservation of the Democratic Process is Not Served by Patronage Practices, and Even if it Were, the Use of Such Practices Would in Any Event Be Unjustifiable With Regard to Persons Already Employed by the Government

We turn now to the interest of the State in the preservation of the democratic process, which is the interest that Justice Powell championed in his dissents in *Elrod* and *Branti*. Moreover, it appears to be this interest, and not the interest of the State as an employer, that persuaded the court below and certain other courts of appeals to limit the reach of *Elrod* and *Branti*.

According to Justice Powell, patronage practices are essential incentives for participation in the political process by those who otherwise would not become politically active. *Elrod*, 427 U.S. at 379 (Powell, J., dissenting).

[32] The Court has recognized that seldom, if ever, can patronage be shown to contribute materially to the efficiency and effectiveness with which employees perform their duties. *See Elrod*, 427 U.S. at 364-67 (plurality opinion); *Branti*, 445 U.S. at 517-18 n.12. And, while there certainly are some positions for which patronage is justified as a means of ensuring "that representative government not be undercut by tactics obstructing the implementation of policies of the new administration," *Elrod*, 427 U.S. at 367 (plurality opinion), that category is not a broad one, *see id.* at 367-68; *Branti*, 445 U.S. at 517-20, and the positions at issue here plainly are not within it.

This alleged increase in participation, he indicated, is in turn necessary to assure "stable political parties and avoid excessive political fragmentation." *Id.* at 383. And it was the position of Justice Powell that without stable political parties, the influence of single-issue special interest groups would predominate, and " 'unrestrained factionalism . . . [might] do significant damage to the fabric of government,' " *Branti*, 445 U.S. at 528 (Powell, J., dissenting) (quoting *Storer v. Brown*, 415 U.S. 724, 736 (1974)).[22] More specifically, Justice Powell felt that it is at the state and municipal levels that the incentives of patronage are particularly necessary for the efficient functioning of political parties, because there otherwise would be little incentive for political involvement at those levels. *Elrod*, 427 U.S. at 384-85 (Powell, J., dissenting).

Justice Powell's concerns were, of course, unpersuasive to the majority of the Court in both *Elrod* and *Branti*. Justice Brennan's plurality opinion in *Elrod* acknowledged that "[p]reservation of the democratic process is certainly an interest protection of which may in some instances justify limitations on First Amendment freedoms," 427 U.S. at 368, but the plurality concluded that "[t]he [democratic] process functions as well without the practice [of patronage], perhaps even better, for patronage dismissals clearly also retard that process," *id.* at 369.

We find Justice Brennan's reasoning persuasive, and submit that employment patronage is, at bottom, a practice that in all of its manifestations profoundly disserves the democratic process. As the *Elrod* plurality stated, in

[22] Justice Powell also was concerned that with the hypothesized weakening of parties, and especially the weakening of party ties and identification with parties, the electorate would be less able "to choose wisely among candidates." *Branti*, 445 U.S. at 531 (dissenting opinion). He asserted that voters who "traditionally have relied upon party affiliation as a guide to choosing among candidates . . . [will be] less able to blame or credit a party for the performance of its elected officials." *Id.* "In local elections, a candidate's party affiliation may be the most salient information communicated to voters." *Id.* at 531 n.17.

an analysis that applies with equal force to *all* patronage employment practices:

> Patronage can result in the entrenchment of one or a few parties to the exclusion of others. And most indisputably, as we recognized at the outset, patronage is a very effective impediment to the associational and speech freedoms which are essential to a meaningful system of democratic government. Thus, if patronage contributes at all to the elective process, that contribution is diminished by the practice's impairment of the same.

Id. at 369-70. *See also* Epstein, *The Supreme Court 1987 Term—Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv. L. Rev. 1, 71 (1988) ("appointments or dismissals with political . . . conditions attached will . . . tend to distort or skew the political process in favor of entrenched interests"); J. James, *American Political Parties in Transition*, 85 (1974) (patronage incentives create party disunity by provoking quarrels over distribution of rewards, and repel from party activity those who might respond to other types of incentives); Sorauf, *The Silent Revolution in Patronage*, 10 Pub. Admin. Rev. 28, 29 (Winter 1960); Sorauf, *Patronage and Party*, 3 Midwest J. of Pol. Sci. 115, 123, 125 (1959) (patronage may create intra-party squabbles just as easily as intra-party cohesion or vitality).

Nor do we accept Justice Powell's assumption that without the availability of financial incentives in the form of patronage, citizens would not become involved in political activities. Even before *Elrod* was decided there had been a strong decline in the use of patronage in most jurisdictions, due to the adoption of merit systems as well as other factors, *see Elrod*, 427 U.S. at 354 and n.8 (plurality opinion), and we are aware of nothing to suggest that the democratic process has withered in those jurisdictions, *see id.* at 369. *See also* F. Sorauf & P. Beck, *Party Politics in America* 96-99 (6th ed. 1988) (in spite of impediments to the viability of state party organiza-

tions such as the extension of civil service systems, "state parties [are] in important respects healthier today than they [were] twenty years ago"; "state and local parties may be stronger today than they have been in many years"); Sorauf, *Patronage and Party, supra*, 3 Midwest J. of Pol. Sci. at 118-20 (decline of patronage "accompanied by no perceptible weakness of the parties"; "in states such as Wisconsin political parties have survived and achieved a certain measure of strength and discipline without the inducement of political appointments").

Although Justice Powell thought it "naive" to believe that people become involved in local politics out of a "public service impulse," *Elrod*, 427 U.S. at 385 (Powell, J., dissenting), the contention that only the prospect of material benefits draws people into local politics has been rejected by knowledgeable authorities. "[I]t is likely that the majority of persons who are active members of local party organizations seek neither material benefits nor the achievement of large ends, but merely find politics—or at least coming together in groups to work at politics—intrinsically enjoyable." J. Q. Wilson, *Political Organizations* 110 (1973). *See also* F. Sorauf & P. Beck, *Party Politics in America, supra*, at 110-13; R. Blank, *Political Parties* 133 (1980) (patronage explains no more than "a small portion of party activity"); Sorauf, *Silent Revolution, supra*, 10 Pub. Admin. Rev. at 31-33; Note, *First Amendment Limitations on Patronage Employment Practices*, 49 U. Chic. L. Rev. 181, 201-02 & nn.131-32 (1982).[34]

[34] Indeed, it has in recent years been questioned whether patronage employment practices are in fact effective in promoting political party participation by the beneficiaries of those practices. *See, e.g.*, Johnston, *Patrons and Clients, Jobs and Machines: A Case Study of the Uses of Patronage*, 73 Amer. Pol. Sci. Rev. 385, 389-90 & n.3, 390-91, 394-95, 397 (patronage "does not necessarily produce high levels of active support"; jobs "leave much to be desired as organization-maintaining incentives"); Gump, *The Functions of Patronage in American Party Politics: An Empirical Reappraisal*, 15 Midwest J. of Pol. Sci. 87, 94-97 (1971); Sorauf, *Silent Revolution, supra*, 10 Pub. Admin. Rev. at 30, 33 ("Patronage no longer is the potent inducement to party activity it once was."); Sorauf, *Patronage and Party, supra*, 3 Midwest J. of Pol. Sci. at 120-21.

Furthermore, the "party-building" rationale posited by Justice Powell is not "unrelated to the suppression of ideas," as it must be in order to justify an infringement of First Amendment rights. *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984). To the contrary, not only does that rationale relate to the *content* of political belief and association, but its very purpose is *to induce individuals to alter their political beliefs and associatons.* This rationale thus stands in sharp contrast to the kinds of government purposes generally accepted as compelling in the First Amendment context.

For example, if the State takes the position (rightly or wrongly, depending on the nature of the position involved, *see supra* at pp. 20-21) that only a Democrat properly can perform a certain job, the State's purpose is not to influence people to become Democrats (although that may certainly be the effect of its actions), but rather to select the best person for the job. The governmental purpose thus invoked, *if supported by the facts*, is unquestionably legitimate, and its proper reach is clearly defined. The "party building" rationale offered by Justice Powell, on the other hand, is based solely on the content of political beliefs and association; it has as its very purpose the enhancement or diminution of particular political beliefs and associations; and it is potentially unlimited in its ramifications.[35] As one commentator has noted:

> [The State's asserted interest in] induc[ing] time and money to political campaigns[] is dependent on the coercive effect of the patronage practice at issue. Yet that coercive effect is the very reason patronage is presumptively hostile to the Constitution. Thus it

[35] For example, on Justice Powell's reasoning it would appear that electoral victors would not violate the First Amendment if they were to pay cash bonuses, out of government funds, to their supporters.

> would be contradictory to argue that patronage actions short of dismissal do not have a significant coercive effect while simultaneously asserting the need to coerce partisan support.

Note, *First Amendment Limitations on Patronage Employment Practices, supra*, 49 U. Chic. L. Rev. at 200 n.120.

In short, the State's interest in the preservation of the democratic process is not served (indeed, it is disserved) by employment patronage, and thus this interest does not provide any justification for the use of patronage in making employment decisions. It is important to point out, however, that this conclusion does not mean that all patronage practices are constitutionally proscribed. As previously indicated, there is under *Branti* a significant class of positions—including most "policymaking" positions—as to which the use of patronage may be justified by the State's interest *as an employer*. There simply has been no demonstration that the preservation of the democratic process generally, or of political parties specifically, requires a broader range of patronage than this.

But if the Court should conclude otherwise, and find some legitimacy in Justice Powell's "party-building" rationale, it then would be necessary to determine *which* additional patronage practices should be sanctioned. Indeed, Justice Powell himself declared only that this asserted governmental interest should lead to "allowing *some* patronage hiring practices," *Elrod*, 427 U.S. at 382 (Powell, J., dissenting) (emphasis added). *See also id.* at 387 (Powell, J., dissenting) (criticizing plurality because "no alternative to *some* continuation of patronage practices is suggested") (emphasis added). The note of caution in those statements is dictated by the settled prescript that when limitations on freedom of belief and association are permissible, the government must accomplish its legitimate purpose by the least restrictive means available. As the Court has declared: "If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a . . . scheme that

broadly stifles the exercise of fundamental personal liberties." *Kusper v. Pontikes*, 414 U.S. 51, 59 (1973). *See also Elrod*, 427 U.S. at 362-63 (plurality opinion); *Boos v. Barry*, 485 U.S. 312, 108 S. Ct. 1157, 1168 (1988); *Roberts v. United States Jaycees, supra*, 468 U.S. at 623; *Buckley v. Valeo*, 424 U.S. 1, 29 (1976); *NAACP v. Button*, 371 U.S. 415, 433 (1963); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). *Cf. Ward v. Rock Against Racism*, —— U.S. ——, 109 S. Ct. 2764, 2758 n.6 (1989).

Accordingly, if the Court were to conclude—contrary to our submission—that some patronage employment practices other than those permitted by *Branti* are necessary to insure the survival of "stable political parties," the foregoing principle would mandate that the line be drawn at patronage *hiring*, and that the use of patronage not be allowed with regard to persons *after they have been hired.* It strains credulity to assert that the hypothesized governmental interest in the survival of political parties requires that such parties be allowed not only to assure their followers of preference in hiring, but also to assure them that patronage will dictate who is to be rehired after layoff, promoted, transferred, or otherwise favored or disfavored after hire. *See* Gump, *The Functions of Patronage in American Party Politics: An Empirical Reappraisal*, 15 Midwest J. of Pol. Sci. 87, 106 (1971) ("for the overwhelming number of [patronage] jobs it is the original preferment, not the continuation of the grantee in the job, which is a valuable resource for the [party] chairman"). Such an all-encompassing use of patronage simply is not the least restrictive means of protecting the viability of political parties.

Furthermore, the use of patronage with respect to those already employed by the government is in other respects more objectionable than the use of patronage in hiring. Although the First Amendment injury inflicted by patronage does not vary depending on the nature of the employment action involved, it cannot be denied that the use of patronage to stunt the careers of persons al-

ready hired is more "intrusive," *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 283 (1986) (plurality opinion), than the use of patronage to determine who will be hired in the first place.

Moreover, a system that rewards or punishes employees for the degree of political support and activism they demonstrate *while in the public employ* inevitably puts pressure on such employees to demonstrate political loyalty by using their government positions for the benefit of a political party. One need not be omniscient to recognize that public employees, knowing that their job security and aspirations for advancement will be determined by their demonstrated loyalty to the party, will in some cases be impelled to serve the party (rather than the public) not only off the job, but on the job as well, by providing favors to members of the party or otherwise using their positions to benefit the party. In this respect patronage conflicts not only with "[the] demonstrated interest in this country that government service should depend upon meritorious performance rather than political service," *Connick*, 461 U.S. at 149, but also with the distinct and equally important interest that public employees not be seen to be "practicing political justice" in performing their duties. *CSC v. Letter Carriers*, 413 U.S. 548, 565 (1973).[36]

For these reasons, if the Court were to determine that the alleged interest of the government in using patronage as a means of fostering the democratic process is sufficient

[36] Our position in this regard should not be misunderstood. We certainly carry no brief for federal or state laws that prohibit *voluntary* political activities by public employees, and we reject the notion that to allow public employees, *as citizens*, to engage in voluntary political activities is tantamount to allowing government positions to be used for such activities. Our point is simply that if public employees are told, through operation of a patronage system, that their career opportunities are dependent on demonstrated political loyalty, the employees will be impelled to demonstrate that loyalty not only through outside political activities, but through conduct in their jobs as well.

to justify "some patronage hiring practices," *Elrod*, 427 U.S. at 382 (Powell, J., dissenting), beyond those already permitted by *Elrod* and *Branti*—a position we strongly believe should not be adopted—the line should in any event be drawn at hiring, and the Court should proscribe the use of patronage with respect to persons already employed in positions for which political affiliation is not an "appropriate requirement," *Branti, supra*.

CONCLUSION

For the reasons stated, the decision of the Court of Appeals should be reversed to the extent that it requires the dismissal of any of plaintiffs' claims.

Respectfully submitted,

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